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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 15, 1901.

No. 199.

FRED A. McMASTER, ADMINISTRATOR OF THE ESTATE OF F. E. McMASTER, DECEASED, PLAINTIFF IN ERROR AND PETITIONER,

vs.

THE NEW YORK LIFE INSURANCE CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ADDITIONAL MEMORANDUM ON BEHALF OF DEFENDANT IN ERROR, SUBMITTED BY LEAVE OF COURT.

W. E. ODELL,
Attorney for Defendant in Error.

GEORGE W. HUBBELL,
FREDERIC D. McKENNEY,
Of Counsel.

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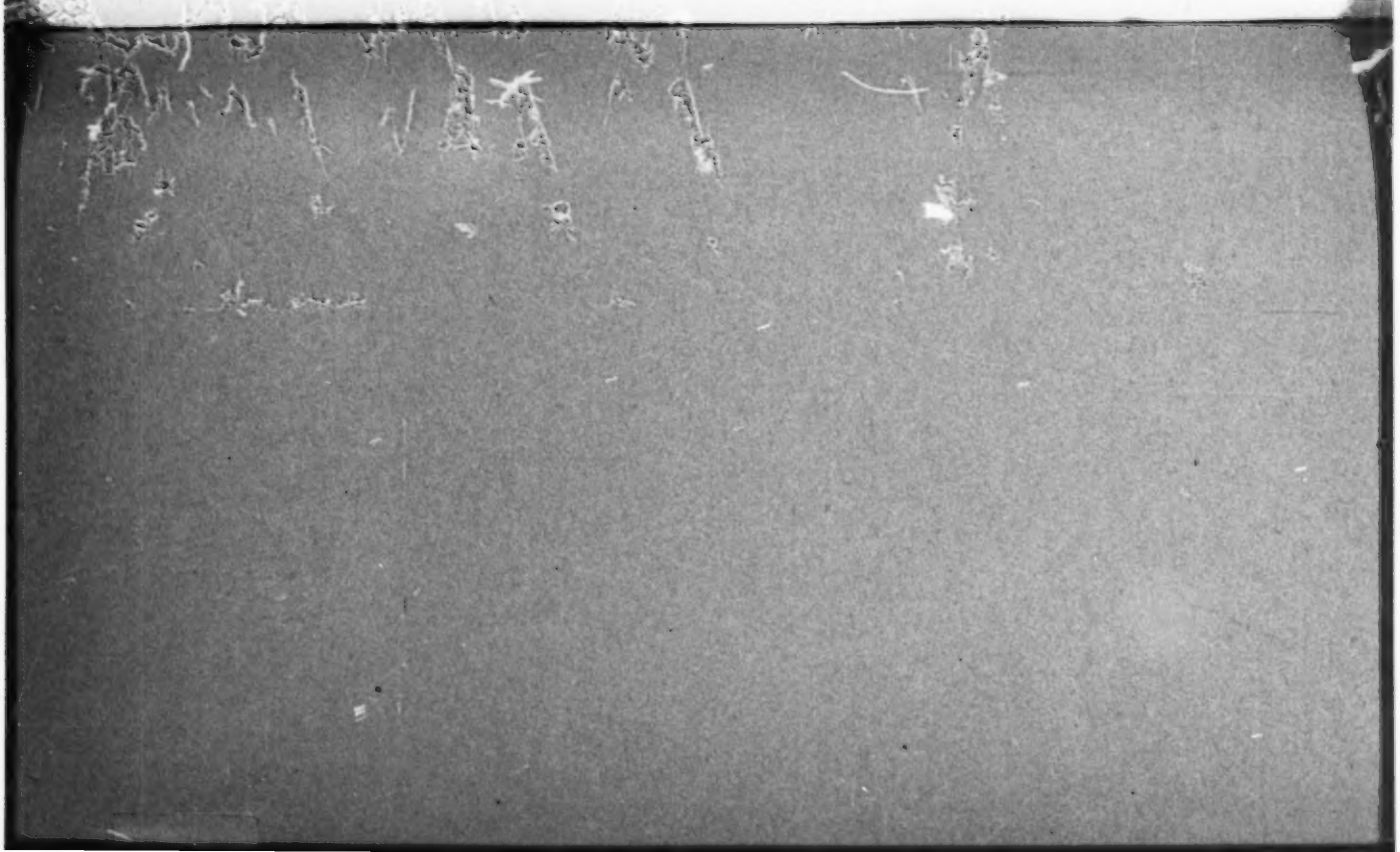

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Additional Memorandum on Behalf of Defendant in Error, Submitted by Leave of Court.

Throughout the progress of this cause the contention on behalf of the plaintiff has ever been that the insured had bought and paid in advance for thirteen months' insurance from December 26, 1893, the date the policies were delivered and the first annual premiums been paid.

This contention is based upon the seventh finding of fact, to the effect that by express understanding between the

agent and the applicant "it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered," taken in connection with the "grace" provision of the policy, which declared that after the policy had "been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent. per annum for the number of days during which the premium remains due and unpaid."

Plaintiff's deduction from these two provisions is that under the contract of insurance the assured was guaranteed thirteen full months of insurance from and after the date the policies "went into force" by the concurrent acts of delivery and payment of the first premiums.

That this deduction is fallacious necessarily appears when the seventh finding of fact is considered in connection with the WHOLE policy, which was accepted and retained by the assured for more than a year before his death.

The policies sued upon are not ordinary life policies which require premiums to be paid annually in advance by the insured so long as he shall live. They are what are known as "20 accumulation policies" (R., 11, Q. 9, A. B. C.) and provide that "in consideration" of the sum of twenty-one dollars, to be paid in advance, *and of the payment of a like sum on the twelfth day of December, in every year thereafter during the continuance of this policy*" * * * "IF THE INSURED IS LIVING ON THE 12TH DAY OF DECEMBER, IN THE YEAR NINETEEN HUNDRED AND THIRTEEN, ON WHICH

DATE THE ACCUMULATION PERIOD OF THIS POLICY ENDS, AND IF THE PREMIUMS HAVE BEEN PAID IN FULL TO SAID DATE, THE INSURED SHALL BE ENTITLED TO ONE OF THE SIX BENEFITS FOLLOWING:" * * * (R., 6, 7.)

The insured is required to notify the company in writing prior to the end of the accumulation period, which benefit is selected, and in the absence of such notification the apportioned dividend is to be applied to the purchase of an annuity (R., 7).

The policy also provides that "the company will make advances as loans upon this policy at the fifth, tenth, and fifteenth anniversaries of the insurance" under certain conditions thereinafter specified (R., 7).

It appears, therefore, that the kind of insurance applied for by the deceased, and furnished by the company, and now here sued upon, is insurance of a special class, requiring the payment of premiums but for a special and limited period, and guaranteeing to the insured during the life of the policy and in the event of his outliving the full period, his choice of several desirable benefits.

In such class of insurance, as must be apparent, the main considerations are two: 1st. Payment of a specified amount in premiums in a specified number of installments—in the case at bar, twenty (20)—and the continuation of the life of the insured to the expiration of the accumulation period, the insured having always the further advantage that in the event of death within the accumulation period the face of the policy is to be paid to his executors, administrators, or assigns, provided, of course, that the premiums have been paid as the policy requires.

In this class of insurance the premium-due date controls the date of expiration of the accumulation period. The earlier the former, the sooner will the latter occur. For the insured, who looks forward to the enjoyment of the benefits which the policy promises at the expiration of the designated period, the sooner the period expires the better.

In the average human being hope of prolonged life ordinarily exceeds apprehension of early death, and so in applying for and accepting insurance of the class here sued upon the so-called antedating of the premium due-date might well be, and indeed by the insured here might well have been, regarded as a distinct advantage.

That such earlier maturing of the accumulation period was an advantage to the insured cannot be denied. That he would have profited by the date of earlier maturity had he outlived the accumulation period cannot be gainsaid. Since, then, he accepted and retained in his immediate possession, without complaint or protest, the policies which guaranteed to him such advantage and profit, with what patience can his personal representative be heard to argue that the making of the premium due-date in the policy to accord with the date of the application for the insurance necessarily worked an injury to the insured? Is it not rather to be presumed that the insured weighed the disadvantage of the earlier payment of the second annual premium against the advantage of the earlier maturity of the accumulation period and found the latter to outweigh the former?

Viewed in this aspect, neither the policy nor any proper construction of the "grace" provision can reasonably be accepted as guaranteeing to the insured on the payment

of the first premium thirteen full months of insurance from the date "the policies went into force." On the contrary, full effect will be given both the agreement of the parties as expressed in the seventh finding of fact and the policy itself by holding that all that the policies either guarantee or require is that in the event of the failure of the insured to pay subsequent premiums on the day specified in the body of the policy the insured should be permitted to pay same at any time within one month thereafter upon the addition of interest at the rate of 5 per cent. per annum.

In Methvin *vs.* Fidelity Mutual Life Association of Philadelphia, 61 Pac. Rep., p. 1112 (California), the policy of life insurance sued on was dated July 30, 1895, and provided that it should not be binding until delivery and payment of the first premium, subsequent premiums to be paid quarterly. Policy was delivered and first premium paid September 3, 1895. The second quarterly premium, which, according to the terms of the policy, was payable October 30, 1895, was not paid, and the insured died in November.

Upon suit brought, the supreme court of California, in department, three judges sitting, held that the policy went into effect (force) September 3, when the first premium was paid, and that—

> "when the insured received his policy and paid his quarterly premium he was insured for three months from September 3d, the date when the policy went into force and effect. The insured died in November, 1895, and we see no reason why his policy of insurance was not alive and in full force at that time."

Judgment went for plaintiff. Upon appeal to same court *in banc*, before seven judges, including the three who heard and determined the case in department, this judgment was unanimously reversed, the court saying in its opinion:

"The policy was executed, as appears on its face, July 30, 1895. Necessarily some little time must elapse between its execution in Philadelphia and delivery in Los Angeles which both parties to the contract of course well understood; and without the provision contained in the policy, that it would not be binding until delivered, the same result would have followed. The payments are expressly specified in the policy to be due and payable on or before the 30th day of July, October, January and April every year. * * * On the trial it was conceded that the second payment was not made, but it was contended that the payment of the first premium ran three months from the 3d day of September, instead of from July 30, 1895, as plainly declared in both the policy and the receipt for the first payment delivered with it."

and the failure to pay this second premium upon the day specified in the policy for its payment was held to end the plaintiff's suit.

In Bryan *vs.* National Life Ins. Ass'n, 21 Rhode Island, 149, the application for the insurance was signed March 18, 1890; the policy was issued and dated March 22, and required the monthly premiums to be paid in advance on the 15th of each month for a period of twenty (20) years.

Premiums were paid regularly, as specified in the policy, to and including December 15, 1891, when the last payment was made.

The insured died January 28, 1892. Suit was brought on the policy, and the defense was that the policy had lapsed for non-payment of premiums.

SEMMES, *J.*:

"Payment being required in advance, the payment made at its issue would go until the next pay-day should come. The fact that this would be three days less than a month does not affect the case since the payments, being parts of a fixed total, were not payments for a month, but payments due on a particular day of a month."

So in the case at bar, the payment of the first premium made upon delivery of the policy being but a part of a fixed and definitely ascertained whole, viz., one-twentieth of the entire amount of premiums required by the policy to be paid—carried the insurance to the next pay-day and one month beyond. The fact that the next pay-day occurred less than twelve months after such payment does not alter the case, for the payment made was not a payment for such period, but merely one of twenty similar payments which by the terms of the policy were required to be made on a designated day in each and every year of the accumulation period.

And this principle has heretofore been established by this court in Insurance Co. *vs.* Statham (93 U. S., 24), where Mr. Justice Bradley, speaking for the court, said:

"It has been contended that the payment of each premium is the consideration for insurance during the next following year, as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten or twenty annual installments. Such installments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the

whole life. The value of assurance for one year of a man's life when he is young, strong and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

"But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. * * * The insured parties are associates in a great scheme.

"This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average which underlies the whole business."

* * * * * * *

"The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence."

In the course of the argument in this court attention was called by Mr. Chief Justice to the table of guarantees appearing on page 10 of the record, which table appeared to have been calculated in a double aspect. In this connec-

tion it would seem not to be amiss to call attention to the fact the policies issued to the deceased and here sued upon are numbered 577,242, 577,243, 577,244, 577,245, and 577,246 respectively (R., 3), while the policy annexed to the declaration and containing the mixed table of guarantees above referred to, being Exhibit "A," is numbered 512,382.

It now appears that in addition to the policies above enumerated and here sued upon, other policies of the same general class had been issued to the insured, among them being policies numbered 512,380, 512,381, and 512,382. These policies having also lapsed, counsel for plaintiff appears to have preferred to append to his declaration as an exhibit the last-numbered policy rather than one of the policies sued on, having first duly altered the exhibit to correspond with the policies in suit. Either in making up the transcript of record for the circuit court of appeals or in the printing thereof, the alterations failed to be properly noticed, as appears from the certificate of the clerk of the circuit court of the United States for the northern district of Iowa and accompanying papers printed as an appendix to this brief.

W. E. Odell,
For Defendant in Error and Respondent.

George W. Hubbell,
Frederic D. McKenney,
Of Counsel.

APPENDIX.

UNITED STATES OF AMERICA, } ss:
Northern District of Iowa, }

FRED. A. McMASTER, *Administrator of the Estate of Frank McMaster, Dec'd,*
vs.
NEW YORK LIFE INSURANCE COMPANY. } No. 217. Law.

I, A. J. Van Duzee, clerk U. S. circuit court for said district, do hereby certify that I have in my possession and charge all the papers in a certain action at law tried and determined in said court, in which Fred. A. McMaster, administrator, etc., was plaintiff and The New York Life Insurance Company of New York was defendant; that the paper hereto attached, marked Exhibit "A," I copied from and is a portion of Exhibit "A" attached to the original petition in the law action above described; that the same is true and correct in each particular and detail.

Witness my hand and official seal of said court hereto affixed this 28th day of March, A. D. 1901.

A. J. VAN DUZEE, *Clerk*,
[SEAL.] By J. H. BOLTON, *D'p'ty.*

"EXHIBIT A."

Benefits and Provisions Referred to in This Policy.

Non-forfeiture.

After this policy shall have been in force three full years, in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy, and provided the policy has not been terminated by death within the month of grace allowed in the payment of pre-

miums (1) the insurance will be extended for the face amount, as provided in the table below, or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in the said table; or (3) the policy will be reinstated within the said six months upon payment of the overdue premium with interest at the rate of five per cent. per annum, if the insured is shown by evidence satisfactory to the company to be in good health.

Table of guarantees, if payment of premiums is discontinued,

Provided there is no indebtedness against the policy.

(Pursuant to the insurance law [chapter 690, Laws of 1892] of the State of New York.)

If the premiums are paid—	(1) The insurance of $1,000 (without participation in profits) will be extended —	or (2) The policy may be converted into non-participating, paid-up insurance—
To December 12, 1896..	To March 12, 1899....	Of $64
" " " 1897..	" " " 1901....	" 84
" " " 1898..	" April " 1903....	" 105
" " " 1899..	" March " 1905 ...	" 126
" " " 1900..	" February " 1907...	" 147
" " " 1901..	" January " 1909...	" 169
" " " 1902..	" December " 1910 ..	" 190
" " " 1903..	" " " 1912....	" 212
" " " 1904..	" " " 1914..	" 233
" " " 1905.	" " " 1916...	" 255
" " " 1906..	" October " 1918 ..	" 276
" " " 1907..	" August " 1920 ...	" 298
" " " 1908..	" April " 1922 ..	" 319
" " " 1909..	" November " 1923...	" 340
" " " 1910..	" May " 1925 ..	" 361
" " " 1911..	" October " 1926...	" 382
8. " " " 1912..	" February " 1928....	" 403

Policies continued in force beyond the accumulation period will be entitled, in case of non-payment of any premium subsequently due, to extended insurance or reduced paid-up insurance on the same basis as that on which the above table is constructed. 2100.

STATE OF NEW YORK, *City and County of New York,* } ss:

Benjamin T. Wilcox, being duly sworn according to law, on his oath saith that he is the manager of the division of policy issues of the New York Life Insurance Company; that the division of which he has charge issues all the policies of the New York Life Insurance Company for the United States, and that all of the policies are prepared, drafted, and signed in his office; that in order to insert the non-forfeiture table and guarantees, pursuant to the New York insurance law, chapter 690 of the Laws of 1892, upon any policy which may be issued, such application is referred to the actuarial department of the company, and a table is prepared by such department, to be inserted in the policy to be issued.

That on December 18th, 1893, five policies were issued by the New York Life Insurance Company upon the life of F. E. McMaster, in the sum of one thousand dollars ($1,000) each, and bearing numbers 577, 242, '3, '4, '5, and '6, and that the application of the said F. E. McMaster for such policies was referred in the usual course to the actuarial department, and a table was prepared, called a non-forfeiture table and showing extended insurance or paid-up insurance, to which the said applicant might become entitled under the non-forfeiture law above referred to.

And deponent saith that the original table prepared by the actuarial department is hereto attached and made a part of this affidavit, and that the same was copied into each one of the policies issued upon the life of the said F. E. McMaster bearing the above numbers, and which are the policies now sued upon.

Deponent further saith that he has been shown a transcript of the record of the case of Fred. A. McMaster, administrator of the estate of F. E. McMaster, deceased, plaintiff in error, *vs.* New York Life Insurance Company, and has read Exhibit "A" contained on pages 6, 7, 8, 9, and 10 of said transcript, and that his attention has been particularly called to a table contained on page 10 of said record, purporting to give amounts of paid-up insurance and terms of extended insurance in case payment of premiums should be discontinued after three years; and deponent saith, to the best of his knowledge and belief, said table, so printed on said page

10, is incorrect, and is not the table which was contained in the said five policies when they were issued from the home office; and deponent further saith, that in the particulars in which said printed table, on page 10, differs from the original actuarial table appended to this affidavit, said printed table is incorrect, and in those respects is not a true copy of the policies which were issued by the New York Life Insurance Company.

Deponent further saith that the guarantees contained in said policies relate to the payment of premiums of the 12th day of December of each year, which is the date of the application for the insurance, and that it is the custom and usage of the New York Life Insurance Company to commence the insurance year on the date of the application, and to require payment of premium on each recurring anniversary of such date, for the reason that the rate of premium is based upon the age of the applicant, and the age is ascertained from the application.

BENJAMIN T. WILCOX.

Subscribed and sworn to this 19th day of March, 1901.

[SEAL.] R. A. CHICHESTER,
Notary Public, Kings Co.

Certificate filed in New York Co.

Life ordinary.	To be used in the home office only in connection with application of Mr. F. E. McMaster. Accumulation period ends Dec. 12, 1913. Guaranteed equity, $239.	No. 577,242. 577,243. 577,244. 577,245. 577,246. Amount, 5 pol., $1,000 e.
Note.—Strike out the rates not needed.	Loans... From 4th to 10th years, inclusive, $47 " 11th to 15th " " 102. " 16th to 20th " " 166.	Age, 26. Premium, $21 each.

This margin is reserved for binding and must not be written on.

All answers are required to be written in the spaces opposite the questions, and must not run over into subsidiary spaces.

Non-Forfeiture Table.

Pursuant to the insurance law (chapter 690, Laws of 1892) of the State of New York.

Dedell, B. H.

If the premiums are paid to—	The insurance of $1,000 will be extended without further payment of premiums to—	Or (subject to conditions above) the policy may be converted into a paid-up insurance without further payment of premiums for the amount of—
Dec. 12, 1896	M'ch 12, 1899	$64
" 1897	" " 1901	84
" 1898	Ap'l " 1903	105
" 1899	M'ch " 1905	126
" 1900	Feb'y " 1907	147
" 1901	Jan. " 1909	169
" 1902	Dec. " 1910	190
" 1903	" " 1912	212
" 1904	" " 1914	233
" 1905	" " 1916	255
" 1906	Oct. " 1918	276
" 1907	Aug. " 1920	298
" 1908	Ap'l " 1922	319
" 1909	Nov. " 1923	340
" 1910	May " 1925	361
" 1911	Oct. " 1926	382
" 1912	Feb'y " 1928	403

Examined.
W. —

STATE OF NEW YORK, } ss:
City and County of New York, }

W. H. Clapp, being duly sworn according to law, on his oath saith that he is the superintendent of the accumulation division of the New York Life Insurance Company, which division has charge of the preparation of non-forfeiture tables to be inserted in accumulation policies; that the table, partly printed and partly written upon yellow paper, attached to the affidavit of Benjamin T. Wilcox, is the original table, according to the knowledge and belief of deponent, which was prepared in his department for insertion in policies Nos. 577, 242, '3, '4, '5, and '6, on the life of F. E. McMaster, and that the terms of extended insurance therein stated and the amounts of paid-up insurance therein contained for one thousand dollars ($1,000), at age twenty-six, where the accumulation period ends December 12th, 1913, are correct.

W. H. CLAPP.

Subscribed and sworn to this 19th day of March, 1901.

[SEAL.] R. A. CHICHESTER,
Notary Public, Kings Co.

Certificate filed in New York Co.